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No. 85-1426

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

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COAKLEY & WILLIAMS, INC.,

Petitioner,

vs.

SHATTERPROOF GLASS CORPORATION,

Respondent.

---

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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# BRIEF FOR THE RESPONDENT IN OPPOSITION

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30 pp

## THE QUESTION PRESENTED IS MOOT

The factual predicate for petitioner's question, i.e., that petitioner was the "ultimate purchaser of the goods," does not exist. The District Court found as a fact that petitioner was not a buyer of goods, having contracted primarily for services, not goods. (A-11 to A-33). The Fourth Circuit affirmed. Coakley & Williams, Inc. v. Shatterproof Glass Corp., 778 F.2d 196 (4th Cir. 1985). (A-1 to A-10). Petitioner does not ask for review of this finding. Accordingly, the question presented is moot.

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# BRIEF FOR THE RESPONDENT IN OPPOSITION

The respondent, Shatterproof Glass Corporation ("Shatterproof")[1], respectfully requests this Court to deny

[1] In accordance with Rule 28.1, respondent represents that it has no parent companies, subsidiaries or affiliates.

the petition for writ of certiorari seeking review of the Fourth Circuit's opinion in this case.

## STATEMENT OF THE CASE

### I. MATERIAL FACTS

The facts material to the consideration of the question presented are limited to the following. Petitioner, Coakley & Williams, Inc. ("Coakley"), acting as the general contractor in the construction of an office building in Maryland, entered into a contract with a glazing subcontractor, Washington Plate Glass Co. ("Washington"), under which Washington was to furnish and install aluminum and glass curtain wall and storefront work.

The District Court found as a fact that Coakley, under its contract with Washington, had contracted primarily for the provision of services, not for the

sale of goods and thus was not a buyer of goods (A-11 to A-33). The Fourth Circuit affirmed. Coakley & Williams, Inc. v. Shatterproof Glass Corporation, 778 F.2d 196 (4th Cir. 1985) (A-1 to A-10). Coakley does not seek review by the Court of this finding of fact.

II. CONTROLLING STATUTES

Suit was brought by Coakley against Shatterproof, as the manufacturer of the glass materials used by Washington in the performance of its subcontract with Coakley, on the theory of breach of the implied warranties of merchantability and fitness for particular purpose under Maryland U.C.C. §§2-314 and 2-315, respectively. Thus, the controlling law is the Maryland version of the Uniform Commercial Code, contained in Title 2, Commercial Law Article, Annotated Code of Maryland ("Maryland U.C.C.").

The specific Maryland statutory provisions material to the question

presented are Maryland U.C.C. §§2-103(1)(a), 2-314(1) and 2-315. These statutes provide, in relevant part:

> §2-103. Definitions and index of definitions.
>
> (1)(a) "Buyer" means a person who buys or contracts to buy goods.
>
> * * *
>
> §2-314. Implied warranty; merchantability; usage of trade.
>
> (1) Unless excluded or modified (§2-316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind . . . . Notwithstanding any other provisions of this title
>
> (a) In §§2-314 through 2-318 of this title, "seller" includes the manufacturer, distributor, dealer, wholesaler or other middleman or retailer; and
>
> (b) Any previous requirement of privity is abolished as between the buyer and the seller in any action brought by the buyer.

* * *

§2-315. Implied warranty; fitness for particular use; applicability to lease and bailment of goods.

(1) Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section an implied warranty that the goods shall be fit for such purpose.

Sections 2-314(1)(a) and (b) are Maryland amendments to the standard version of the U.C.C.

III. PROCEEDINGS BELOW

The case was initially dismissed by the Maryland District Court pursuant to Fed.R.Civ.P. 12(b)(6) for failure to state a cause of action upon which relief can be granted. The ground for dismissal was that the predominant purpose of the Coakley-Washington

contract was the provision of services, not the sale of goods, thus rendering the Maryland U.C.C. inapplicable to Coakley.

On appeal, the Fourth Circuit in Coakley & Williams, Inc. v. Shatterproof Glass Corp., 706 F.2d 456 (4th Cir. 1983), held that both the applicability of the Maryland U.C.C. warranties, and the amenability of a non-privity defendant to suit under the Maryland U.C.C., are dependent upon the plaintiff being a "buyer of goods." The Fourth Circuit, based on the Maryland U.C.C. provisions, reasoned as follows:

> Whether the U.C.C. applies turns on a question as to whether the contract between Washington and Coakley involved principally a sale of goods, on the one hand, or a provision of services, on the other. U.C.C. Section 2-314 creates an implied warranty "that the goods shall be merchantable" to be "implied in a contract for their sale." Section 2-315 establishes an implied warranty "that the goods shall be fit" for a particular purpose, "[w]here the seller at the time of contracting has reason to

know [the] particular purpose." (Emphasis added).

Consequently, unless there has been a buyer of goods, the U.C.C. warranties of merchantability and of fitness for a particular use do not apply. Furthermore, unless there has been a buyer of goods, [9] the elimination of a requirement of privity would not have been achieved. [10] Accordingly, both questions (1) as to the availability of the warranties and (2) as to the amenability of Shatterproof, who was not in privity with Coakley, to suit by Coakley, come down to whether the transactions between Washington and Coakley was a sale of goods or the provisions of services.

---

9. Under U.C.C. Section 2-103(1)(a), the term "buyer" is defined, in unexceptional terms, as a "person who buys or contracts to buy goods."

10. See U.C.C. Section 2-314(1)(b): "Any previous requirement of privity is abolished as between the buyer and the seller in any action brought by the buyer." (Emphasis added.) Absent compliance with Section 2-314(1)(b), the lack of privity would have been fatal to Coakley's maintenance of the cause of action. E.g., Vaccarino v. Cozzubo, 181 Md. 614, 31 A.2d 316 (1943).

If the transaction was one for goods, Coakley was self-evidently

> the buyer. Shatterproof was the seller of goods in a transaction in which the intermediary, Washington, not Coakley, was the buyer. However, Washington's purpose in buying was to apply the items purchased to uses benefitting Coakley. (Id. at 458-59).

Finding further that the determination as to whether Coakley was a buyer of goods was prematurely resolved on a 12(b)(6) motion to dismiss, the Fourth Circuit remanded the case for findings of fact on the ultimate factual issue as to the predominant purpose of the Coakley-Washington contract, i.e., whether Coakley was a buyer of goods. Specifically, the Fourth Circuit held that:

> . . . it becomes a question of unresolved fact whether Coakley for the purposes of the single relationship to which we are restricted, was a buyer of goods (Id. at 461),

and ordered that on remand:

> Coakley should, therefore, be permitted to show, unless the statute of limitations bars

> recovery, that it was a buyer of goods and, therefore, entitled to proceed under the U.C.C. provisions. (Id. at 462; footnote omitted).

On remand, the District Court conducted a thorough factual inquiry into the threshold question of whether Coakley's contract with Washington to furnish and install an aluminum and glass curtain wall for a building was predominantly a sale of goods, or one for the provision of services. The District Court applied the test for ascertaining the predominant purpose of mixed goods and services contracts adopted by the Maryland Court of Appeals in Burton v. Artery, Inc., 279 Md. 94, 367 A.2d 935 (1977), and in Anthony Pools, A Division of Anthony Industries, Inc. v. Sheehan, 295 Md. 285, 455 A.2d 434 (1983).

After a three-day trial, the District Court found that the predominant purpose of Coakley's

contract with Washington was for the rendition of services, not for the sale of goods. Hence, the District Court concluded that Coakley was not a buyer of goods within the meaning of the Maryland U.C.C., and thus had no right of action for breach of the U.C.C. implied warranties. The District Court further concluded that as one who contracted for services, Coakley could not rely upon the abolition of buyer-seller privity contained in Maryland U.C.C. §2-314(1)(b). [2]

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[2]The District Court did not rule on the four additional grounds asserted for dismissing Coakley's action, which included:

(a) Coakley's action was barred by the four-year statute of limitations;
(b) Coakley failed to prove breach of the implied warranty of merchantability;
(c) Coakley failed to prove the existence of any implied warranty of fitness for

(Footnote Continued)

Coakley then appealed for a second time to the Fourth Circuit. The appeal was premised on two grounds. First, Coakley contended that the District Court erred in finding that its contract with Washington was primarily for services, and thus not within the Maryland U.C.C. Second, Coakley asserted that the District Court erred in concluding that Shatterproof was not liable under the Maryland U.C.C. as a seller of goods, regardless of Coakley's own contractual relationship with Washington. For this latter assertion Coakley relied upon Maryland U.C.C. §2-314(1)(b).

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(Footnote Continued)
particular purpose, or any breach thereof; and
(d) Coakley failed to prove its damages.

The Fourth Circuit disagreed with Coakley. Coakley & Williams, Inc. v. Shatterproof Glass Corp., 778 F.2d 196 (4th Cir. 1985). (A-1 to A-10). First, the Fourth Circuit found nothing erroneous in the District Court's factual finding, and application of fact to law, that Coakley's contract was primarily for services, thus rendering Coakley a non-buyer of goods. Coakley has not petitioned this Court for review of this finding.

The Fourth Circuit also found no merit in Coakley's second contention. The Fourth Circuit reaffirmed its earlier holding, and that of the District Court, that Maryland U.C.C. §2-314(1)(b) requires a non-privity plaintiff, such as Coakley, to nonetheless be a buyer of goods as defined in §2-103(1)(a), in order to have a right of action under the

Maryland U.C.C. The Fourth Circuit held as follows:

> Maryland's amended section 2-314 expanded the definition of "seller" but made no express change in the definition of buyer which remains defined in U.C.C. Section 2-103(1)(a) as "a person who buys or contracts to buy goods." The district court had already concluded that Coakley purchased services, not goods. Coakley offered no controlling authority below to support its contention that the U.C.C.'s clear definition of buyer had been altered. We can, therefore, see no error in the court's conclusion that the expansion of privity in section 2-314 extended no additional rights to a purchaser of services. 778 F.2d at 198. (A-7,8).

Coakley petitions this Court for review of this second issue.

## REASONS FOR DENYING THE WRIT

### I. THE MARYLAND STATUTES ARE DISPOSITIVE OF THE QUESTION PRESENTED

#### A. Maryland U.C.C. §§2-314(1)(b) and 2-103(1)(a) Are Dispositive

Maryland U.C.C. §§2-314(1)(b) and 2-103(1)(a) are dispositive of the

question presented. The Maryland General Assembly's relaxation of the privity requirement coupled with the expanded definition of a seller, but not of a buyer, in §2-314(1)(b), neither broadens the coverage of the U.C.C., nor allows one whose transaction is not a sale of goods to be entitled to sue under the U.C.C. Rather, Maryland U.C.C. §2-314(1)(b) allows one who is in fact a "buyer of goods," and therefore already within the coverage of the U.C.C., to sue a seller of those goods, albeit a seller with whom the buyer is not in privity.

The explicit statutory language of Maryland U.C.C. §2-314(1)(b) abolishes privity only "as between the buyer and the seller in any action brought by the buyer." (Emphasis added). As the Fourth Circuit held, "absent compliance with §2-314(1)(b), the lack of privity is fatal to a non-privity plaintiff's

maintenance of [a] cause of action" under the Maryland U.C.C. 706 F.2d at 459. To comply with §2-314(1)(b), and hence to have a right of action under the Maryland U.C.C. against a non-privity seller, the plaintiff must be a "buyer". A "buyer" under the Maryland U.C.C. is defined in §2-103(1)(a) in unexceptional terms as "a person who buys or contracts to buy goods."

The Fourth Circuit's application of the express statutory definition of the term "buyer" as used in the Maryland U.C.C., and in particular as used in §2-314(1)(b), is consistent with the Maryland courts' repeated application of a rule of strict statutory construction of the Maryland U.C.C. provisions. The Maryland Court of Appeals, the highest court in Maryland, has consistently held that Maryland U.C.C. §2-103(1)(a) clearly limits a "buyer" to one who

actually buys or contracts to buy goods, and excludes third-party beneficiaries of the actual buyer. Mattos, Inc. v. Hash, 279 Md. 371, 368 A.2d 993, 995-97 (1977); Frericks v. General Motors Corp., 278 Md. 304, 363 A.2d 460, 463-66 (1976); Phipps v. General Motors Corp., 278 Md. 337, 363 A.2d 955, 962 (1976).

At issue in Frericks was whether a non-buyer user of goods, entitled to sue a seller under §2-318 for breach of implied warranty, was required to give notice of the breach pursuant to §2-607. This section provided that "The buyer must within a reasonable time . . . notify the seller of breach . . . ." (§2-607(3)(a); emphasis added). The Frericks court held:

> We are not free, in view of the unambiguous language of §2-607 requiring only the buyer to notify the seller of breach, and the definition of buyer in §2-103, to extend that requirement to encompass the plaintiffs here. As the defendants correctly note, it is a cardinal rule of statutory

> construction that a statute should be construed so as to give effect to the real intent of the Legislature. But in ascertaining that intent, a court must first look to the language of the statute. "If there is no ambiguity or obscurity in the language of a statute, there is usually no need to look elsewhere to ascertain the intent of the legislature." Md.-Nat'l Cap. P. & P. v. Rockville, 272 Md. 550, 555-556, 325 A.2d 748, 752 (1974). Here there is no ambiguity in the language of the statute. Section 2-607 requires only the "buyer" to notify the seller of a breach, and §2-103 clearly defines "buyer" so as to exclude third party beneficiaries. (363 A.2d at 465). (Emphasis added).
>
> * * *
>
> Although the Legislature in the 1969 amendments chose to redefine the word "seller" as used in the warranty provisions to include manufacturers and those in the distributive chain, it did not similarly redefine the word "buyer" to include the expanded class of third party beneficiaries, but instead retained the definition of that term found in §2-103. (363 A.2d at 466). (Emphasis added).

Again, in both Phipps and Mattos, the Maryland Court of Appeals emphasized that use of the term "buyer" meant the "actual buyer". The Court stated:

> In light of the 1969 amendments, the Legislature's retention of the definition of "buyer" as a "person who buys or contracts to buy goods" is no less significant here than it was in Frericks. As we suggested not only in Frericks, but subsequently in Phipps v. General Motors Corp., 278 Md. 337, 349-50, 363 A.2d 955 (1976), it is "an actual buyer" (emphasis added) who is required by §2-607 to give notice. (Mattos, Inc. v. Hash, 368 A.2d at 997).

Hence, the clear and unambiguous statutory language of Maryland U.C.C. §§2-314(1)(b) and 2-103(1)(a) are dispositive of the question presented. A plaintiff such as Coakley, who contracts with an installation contractor for the provision of services, as postulated in the question presented and as found by the courts below, by statutory definition is not a buyer of goods under U.C.C. §2-103(1)(a). Accordingly, a non-buyer plaintiff cannot comply with §2-314(1)(b), and has no right of action under the Maryland U.C.C.

B. Maryland U.C.C. §§2-314(1) and 2-315 Are Dispositive

As the Fourth Circuit further held, "unless there has been a buyer of goods, the U.C.C. warranties of merchantability and fitness for a particular use [in Maryland U.C.C. §2-314 and 2-315, respectively,] do not apply." 706 F.2d at 459. Section 2-314 creates an implied warranty "that the goods shall be merchantable" to be "implied in a contract for their sale." 706 F.2d at 458. Section 2-315 establishes "that the goods shall be fit" for a particular purpose, "(w)here the seller at the time of contracting has reason to know (the) particular purpose." 706 F.2d at 458-59.

Accordingly, the Fourth Circuit correctly held that the question of the availability of the implied U.C.C. warranties, like the question of the amenability of a manufacturer, who is

not in privity with a plaintiff, to suit by the plaintiff, is determined by whether the plaintiff's own transaction was a sale of goods or the provision of services. 706 F.2d at 459.

## II. PETITIONER'S POLICY ARGUMENT MUST BE ADDRESSED TO THE MARYLAND GENERAL ASSEMBLY, NOT TO THIS COURT

The Fourth Circuit correctly applied the clear and unambiguous statutory language of the Maryland U.C.C. on both appeals. The question presented is confined to Maryland law as provided in the Maryland version of the U.C.C. The Fourth Circuit's decisions are consistent with both Maryland state and federal case law. No conflict among decisions exist, and Coakley cites to none.

Instead, Coakley argues in essence that as a matter of policy a non-buyer of goods should be able to sue under the implied warranties under the Maryland

U.C.C. Coakley cites no relevant authority in support of its argument.

The Maryland case cited by Coakley, Firestone Tire and Rubber Co. v. Cannon, 53 Md. App. 106, 452 A.2d 192 (1982), is not on point. The Firestone case involved a plaintiff who, unlike Coakley, was a buyer of goods.

Moreover, in Firestone, the Maryland intermediate appellate court applied a rule of strict construction to the definition of the term "seller" for purposes of the notice requirement of Maryland U.C.C. §2-607(3)(a). The Maryland court held that although the Maryland General Assembly amended §2-314 to expand the definition of the term seller to also include remote sellers in the chain of distribution for purposes of warranty actions under §§2-314 through 2-318, the legislature's silence regarding whether this expanded definition also applied to §2-607(3)(a)

meant that it did not apply. The Maryland court held:

> Yet, with presumed (though perhaps not actual) cognizance of the necessary relationship between the warranty sections and the remedy section, [the Maryland General Assembly] declined to extend the definition of "seller" in §2-607(3)(a) which, of course, it easily could have done. (452 A.2d at 198).

Similarly, with presumed cognizance of the relationship between the existing definition of the term "buyer" in §2-103(1)(a), and its use of the term "buyer" in §2-314(1)(b), the General Assebly did not extend the definition of "buyer".

The only other case cited by Coakley, Santor v. A & M Karagheusian, Inc., 44 N.J. 52, 207 A.2d 305 (1965), is a New Jersey case not decided under the Uniform Commercial Code.

Moreover, unlike other states' enactments of the Uniform Commercial Code, Maryland has amended §2-314(1) to

statutorily provide for the relaxation of the privity requirements under statutorily imposed conditions. Accordingly, the decisions of other states are of no import relative to decisions under Maryland U.C.C. §2-314(1). The question presented is confined to Maryland law.

Hence, Coakley offers no relevant authority in support of its argument that as a matter of policy it should have a right of action. The Maryland General Assembly in Maryland U.C.C. §2-314(1)(b) has set forth the circumstances under which the privity requirement is relaxed. Any argument Coakley may have that the privity requirement should be further relaxed in Maryland or that the coverage of the Maryland U.C.C. should be expanded must be addressed to the Maryland General Assembly, not to this Court.

## CONCLUSION

Based on the foregoing argument and authorities, the respondent, Shatterproof Glass Corporation, respectfully submits that the petition for a writ of certiorari should be denied as the Maryland statutes are dispositive of the question presented, and no error, conflict or matter of importance is presented for review.

Respectfully submitted,

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